

N. 302³ No. 15412

United States
Court of Appeals
For the Ninth Circuit

UNDERWRITERS AT LLOYD'S, LONDON,
ENGLAND,

Appellant,

vs.

JANE S. LYONS,

Appellee.

Transcript of Record
In Three Volumes

Volume I
(Pages 1 to 38)

Appeal from the United States District Court for the
District of Oregon

FILED

MAR 21 1957

PAUL P. O'BRIEN, CLERK

No. 15412

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

MEINDL, MIZE & KRIESIEN;

RAY MIZE;

R. E. KRIESIEN,

1431 American Bank Building,
Portland 5, Oregon,

For Appellant.

MAGUIRE, SHIELDS, MORRISON & BAILEY;

ROBERT F. MAGUIRE, HOWARD K. BEEBE,

723 Pittock Block,

Portland 5, Oregon,

For Appellee.

The United States District Court for the
District of Oregon

Civil No. 7256

JANE S. LYONS,

Plaintiff,

vs.

UNDERWRITERS AT LLOYD'S, LONDON,
ENGLAND,

Defendant.

COMPLAINT

Plaintiff complains and alleges as follows:

First Claim

I.

Plaintiff is a citizen and inhabitant of the State of Oregon.

II.

Defendant is an association of individuals engaged in the insurance business and each member of said association is a citizen of the United Kingdom and none of them are citizens or residents of the State of Oregon.

III.

The amount in controversy herein exceeds \$3,000, exclusive of interest and costs.

IV.

Prior to February 10, 1953, defendant for a good, sufficient and valuable consideration, issued to

James A. Lyons a certificate and policy of insurance under the terms of which defendant promised and agreed that in case said James A. Lyons sustained bodily injury resulting in death caused solely and independently of any other cause by external, violent, accidental and visible means it would pay to plaintiff, as beneficiary under said policy, the sum of \$75,000.00.

V.

Said policy and certificate of insurance was in full force and effect at all times mentioned in this complaint.

VI.

On or about February 10, 1953, said James A. Lyons suffered fatal injuries by reason of the accidental discharge of a firearm and his death thereby resulted from and was caused by external, violent, accidental and visible means.

VII.

Plaintiff has performed each and every condition precedent upon her part to be kept and performed and has made claim to defendant for the said sum of \$75,000.00, but defendant has denied all liability under said policy and certificate of insurance and has failed and refused to pay said sum or any part thereof, and the said sum, together with interest thereon at the rate of 6% per annum from February 10, 1953, is due and owing from defendant to plaintiff.

VIII.

More than six months have elapsed since plain-

tiff made claim to defendant and \$15,000.00 is a reasonable sum to be allowed plaintiff as attorneys' fees in the prosecution of this, her First Claim.

Second Claim

I.

Plaintiff realleges, and by this reference incorporates herein, Paragraphs I, II and III of her First Claim.

II.

Prior to February 10, 1953, defendant for a good, sufficient and valuable consideration, issued to James A. Lyons a certificate and policy of insurance under the terms of which defendant promised and agreed that in case said James A. Lyons sustained bodily injury resulting in death caused solely and independently of any other cause by external, violent, accidental and visible means it would pay to plaintiff, as beneficiary under said policy, the sum of \$25,000.00.

III.

Said policy and certificate of insurance was in full force and effect at all times mentioned in this complaint.

IV.

On or about February 10, 1953, said James A. Lyons suffered fatal injuries by reason of the accidental discharge of a firearm and his death thereby resulted from and was caused by external, violent, accidental and visible means.

V.

Plaintiff has performed each and every condition precedent upon her part to be kept and performed and has made claim to defendant for the said sum of \$25,000.00, but defendant has denied all liability under said policy and certificate of insurance and has failed and refused to pay said sum or any part thereof, and the said sum, together with interest thereon at the rate of 6% per annum from February 10, 1953, is due and owing from defendant to plaintiff.

VI.

More than six months have elapsed since plaintiff made claim to defendant and \$5,000.00 is a reasonable sum to be allowed plaintiff as attorneys' fees in the prosecution of this, her Second Claim.

Wherefore, plaintiff on her First Claim demands judgment in the sum of \$75,000.000, with interest thereon at 6% per annum from February 10, 1953, until paid, together with her costs and the further sum of \$15,000.00, attorneys' fees; and, on her Second Claim, plaintiff demands judgment in the sum of \$25,000.00, together with interest thereon at 6% per annum from February 10, 1953, together with her costs and the sum of \$5,000.00, attorneys' fees.

/s/ ROBERT F. MAGUIRE,

/s/ HOWARD K. BEEBE,

Attorneys for Plaintiff.

[Endorsed]: Filed November 13, 1953.

[Title of District Court and Cause.]

Civil No. 7256

ANSWER

Comes now defendant and for answer to plaintiff's complaint, on file herein, admits, denies and alleges as follows:

First Defense

I.

Admits Paragraphs I, II and III of plaintiff's First Claim and Paragraph I of plaintiff's Second Claim.

II.

Denies each and every other allegation of plaintiff's First and Second Claims, and the whole thereof, generally and specifically, except as may be hereinafter admitted.

Second Defense

I.

Defendant alleges that prior to and on or about the 10th day of February, 1953, there was in full force and effect Lloyds Accident Policy, certificate number 0-5058-1, in the principal sum of \$25,000.00, and Lloyds Accident Policy, certificate number O-OMC-1740, in the principal sum of \$75,000.00, wherein James Alexander Lyons was the named assured and Jane Lyons, the designated beneficiary.

II.

That under and by virtue of the terms and pro-

visions of said policies, hereinbefore described, the principal sum became payable in the event the assured, James Alexander Lyons, sustained bodily injury caused by accidental, violent, external and visible means, which solely and independently of any other cause, within three calendar months from the date of the accident causing such injury, occasioned his death, and said policies specifically excluded death directly or indirectly caused or contributed to by disease or natural causes.

III.

That under and by virtue of the terms and provisions of said policies, as a condition to the payment of said principal sum, the claim therefore was required to be substantiated by the submission to defendant of satisfactory proof of death within the policy provisions and without the policy exclusions.

IV.

That plaintiff failed to submit to defendant satisfactory proof:

(a) That the assured sustained bodily injury caused by violent, external and visible means, which solely and independently of any other cause within three calendar months from the date of the accident causing such injury occasioned his death, and

(b) That the assured's death was not directly or indirectly caused or contributed to by disease or natural causes;

and defendant thereupon rejected plaintiff's claim.

Third Defense

I.

Defendant realleges Paragraphs I and II of its Second Defense.

II.

Defendant alleges that if the assured, James Alexander Lyons, sustained any bodily injury prior to his demise, that:

(a) Said injuries did not solely and independently of any other cause occasion his death.

(b) The assured James Alexander Lyons' death was directly or indirectly caused or contributed to by disease or natural causes.

Wherefore, defendant demands judgment that the complaint herein be dismissed and that it have its costs and disbursements of this action.

MEINDL, MIZE & KRIESIEN,

By /s/ R. E. KRIESIEN,

Of Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed December 4, 1953.

[Title of District Court and Cause.]

Civil No. 7256

PRETRIAL ORDER

On the 12th day of September, 1955, a pretrial conference in the above-entitled action was held in

open court, before the Honorable William G. East, Judge of the above-entitled court; plaintiff was represented by Robert F. Maguire and Howard K. Beebe, of her attorneys, and defendant was represented by R. E. Kriesien and Ray Mize, of its attorneys.

Thereupon the following proceedings were had:

Agreed Statement of Facts

I.

That diversity of citizenship exists between the parties in that plaintiff is a citizen and resident of the State of Oregon and defendant is an association of individuals engaged in the insurance business, each member thereof being a non-resident of the State of Oregon.

II.

That the amount in controversy herein exceeds \$3,000.00, exclusive of interest and costs.

III.

That prior to the 10th day of February, 1953, Lloyds Accident Policy certificate number O-5058-1, in the principal sum of \$25,000.00, and Lloyds Accident Policy, certificate number O-OMC-1740, in the principal sum of \$75,000.00 were issued in the State of Oregon, wherein James Alexander Lyons was the named assured, and the plaintiff Jane Lyons, the designated beneficiary, said policies being in full force and effect on the 10th day of February, 1953, said policies being renewals of identical policies in force and effect from July 8, 1948.

IV.

That under and by virtue of the terms and provisions of said policies, Plaintiff's Exhibits 1 and 2, the principal sum became payable to the plaintiff in the event the assured James Alexander Lyons:

(a) Sustained bodily injury caused by accidental, violent, external and visible means, which shall solely and independently of any other cause within three calendar months from the date of the accident causing such injury occasion his death; and

(b) That the assured's death was not directly or indirectly caused or contributed to by disease or natural causes.

V.

That on or about the 10th day of February, 1953, the assured, James Alexander Lyons, died in the country called Los Lanos, Southern Territory of Lower California, Mexico.

VI.

That thereafter an inquest was held and an autopsy performed inquiring into the cause of the death of the assured, James Alexander Lyons, certified copy of which in Spanish is Exhibit 5 and the English translation thereof is Exhibit 5A, and the other certified copies in the Spanish is Exhibit 27 and the English translation thereof is Exhibit 27A.

VII.

That there was duly recorded in the Book of Deaths for the year 1953, Number One of the Civil

Registry in the Port of San Jose del Cabo, Southern Territory of Lower California, Mexico, at pages 3, 4 and 5, as Act Number 5, death certificate which certified that the cause of death of James Alexander Lyons was:

“That the cause of death was owed to an aortical insufficiency that probably provoked the sudden fatigue of the heart having found moreover atheromatous deposits of the coronary arteries.”

A certified copy of the original in Spanish is Exhibit 4 and the English translation thereof is Exhibit 4A.

VIII.

That plaintiff filed proof of death of James Alexander Lyons with defendant. Plaintiff's Exhibit 3.

IX.

That defendant rejected plaintiff's claim and more than six months elapsed thereafter before plaintiff instituted this action.

Plaintiff's Contentions

1. Said James Alexander Lyons died of bodily injury caused by accidental, violent, external and visible means which solely and independently of any other cause occasioned his said death.

2. Said death was not directly caused or contributed to by disease or natural causes.

3. Plaintiff is entitled to recover from defendant the sum of the face amount of said policies, to-

gether with interest thereon at 6% per annum from February 10, 1953, until paid, and, in addition, the sum of \$20,000.00 as and for a reasonable attorneys' fee herein.

Defendant's Contentions

1. That on or about the 20th day of May, 1950, the assured, James Alexander Lyons, suffered an attack of coronary insufficiency.

2. That on the 3rd, 4th and 5th days of February, 1953, the assured, James Alexander Lyons, had a pre-existing heart disease which resulted in an attack of coronary insufficiency to the extent that nitroglycerin was prescribed and the assured, James Alexander Lyons, was advised to refrain from doing any strenuous exercise such as lifting or tramping through the fields.

3. That on the 10th day of February, 1953, the assured, James Alexander Lyons, had a pre-existing heart disease.

4. That the assured, James Alexander Lyons, died as a result of a fatal heart attack due to the diseased condition of his heart and not as a result of an accidental injury and therefor is not entitled to recover under the terms and provisions of the policies of insurance involved herein.

5. That it is more, or as equally, probable the shotgun was discharged as a result of the assured, James Alexander Lyons, suffering a fatal heart attack as it is that the shotgun was accidentally discharged prior to the fatal heart attack.

6. That the proof of death submitted by plaintiff to defendant constituted an admission that a pre-existing heart disease caused or contributed with the injury, if any, in resulting in the death of the assured, James Alexander Lyons, and under the law as enunciated by the Supreme Court of the State of Oregon, such accident, if any, cannot be considered as the sole cause or the cause independent of all other causes of death.

7. That if it is established by competent, satisfactory evidence the shotgun was accidentally discharged prior to the fatal heart attack, the superficial injuries sustained by the assured, James Alexander Lyons, and the resulting emotional shock, if any, would not have caused an aortic insufficiency or a coronary insufficiency without the existence of the pre-existing heart disease and that it was necessary for the pre-existing heart disease to co-operate with the injury, if any, to result in the death of the assured and under such set of facts under the law of the State of Oregon such death was not an accidental death within the policy coverage.

8. That plaintiff failed to submit satisfactory proof the assured, James Alexander Lyons, accidentally discharged a shotgun prior to suffering a fatal heart attack.

9. That plaintiff failed to submit satisfactory proof that the injuries sustained by the assured, James Alexander Lyons,

(a) Solely and independently of any other cause occasioned his death, and

(b) That the assured's death was not directly or indirectly caused or contributed to by the pre-existing heart disease.

10. That in the event plaintiff should prevail, plaintiff is not entitled to attorney's fees.

Issues of Fact

1. Is there any competent, satisfactory evidence that a shotgun was accidentally discharged which inflicted bodily injuries prior to the assured, James Alexander Lyons, suffering a fatal heart attack?

2. Did any bodily injuries sustained by the assured, James Alexander Lyons, solely and independently of all other causes result in his death?

3. Did the assured, James Alexander Lyons, have a pre-existing heart disease?

4. Was the death of the assured, James Alexander Lyons, caused or contributed to by a pre-existing heart disease?

5. Was a diseased heart condition of the assured, James Alexander Lyons, the sole cause of his death?

6. In the event plaintiff is entitled to recover, was the proof of death filed with defendant sufficient proof of accidental death under the policy so as to entitle plaintiff to recover attorney's fees as a result of defendant's denial of such claim and,

if so, what sum would be a reasonable sum to allow plaintiff as attorney's fees herein?

Exhibits

The following exhibits have been displayed by the parties, respectively, and are below enumerated and identified, the parties agreeing with the approval of the court that no further identification of exhibits is necessary. The parties admit the authenticity of the following exhibits, but reserve the right to object to their introduction into evidence on the grounds of irrelevancy, immateriality and incompetency.

Plaintiff's Exhibits

1. Policy No. 0-5058-1.
2. Policy No. O-OMC-1740.
3. Proof of Death.
4. Certified copy of death certificate.
- 4(a). Translation of Death Certificate.
5. Certified copy of Inquest.
- 5(a). Translation of Inquest.
6. Doctor's certificate of February 21, 1953.
- 6(a). Translation of doctor's certificate of February 21, 1953.
7. Shotgun.
8. Roll of film.
9. Deposition of Dr. Rush.
10. Deposition of Dr. McBride.
11. Notes of Dr. Lehman.
12. Letter from Maguire, et al., to Pacific Insurance Adjusters February 26, 1953.

13. Cable Maguire, et al., to Heath February 16, 1953.

13(a). Wire Maguire, et al., to D. K. MacDonald February 16, 1953.

14. Cable Heath to Maguire, et al., February 19, 1953.

15. Letter Pacific Insurance Adjusters to Maguire, et al., February 17, 1953.

16. Letter Pacific Insurance Adjusters to Maguire, et al., February 20, 1953.

17. Letter Pacific Insurance Adjusters to Maguire, et al., April 7, 1953.

18. Letter Maguire, et al., to Pacific Insurance Adjusters July 17, 1953.

19. Letter Maguire, et al., to Pacific Insurance Adjusters September 15, 1953.

20. Letter R. E. Kriesien to Maguire October 30, 1953.

21. Chart, "Your Heart and How It Works."

22. Chart of heart.

23. Illustrative chart.

24.

25.

26.

Defendant's Exhibits

27. Certified copy of Inquest.

27(a). Translation of Inquest.

28. Certified copy of Supplemental Statement.

28(a). Translation of Supplemental Statement.

29. Dr. McBride's medical case history file.

30.

31.

32.

33.

34.

35.

The parties and each of them reserve the right to adopt any or all of the above pretrial exhibits.

The foregoing is certified to be a record of the proceedings had at the pretrial hearing in this court, and it is

Ordered that the issues to be tried herein shall be those herein set forth as issues of law and fact;

It Is Further Ordered that the pretrial conference in this case having been held and participated in by all parties, the pleadings now pass out of the case and the foregoing pretrial order shall control the subsequent course of the trial and shall not be hereafter amended except by consent of the parties or by order of the court to prevent manifest injustices.

Done and dated in open court this 28th day of November, 1955.

/s/ EDWARD P. MURPHY,
United States District Judge.

/s/ HOWARD K. BEEBE,
Of Attorneys for Plaintiff.

/s/ R. E. KRIESIEN,
Of Attorneys for Defendant.

[Endorsed]: Filed November 28, 1955.

[Title of District Court and Cause.]

Civil No. 7256

MEMORANDUM OPINION

These are two actions by the beneficiary of two accident policies issued to James A. Lyons. The insured died on February 10, 1953, near Los Llanos, Lower California, Republic of Mexico, while on a hunting trip with a small party, including two well-qualified cardiologists, Drs. Rush and Chamberlain. The issue for resolution is whether or not the insured died by reason of bodily injury caused by accidental, violent, external and visible means, and whether that injury solely and independently of any other cause within three calendar months from the date of the accident occasioned the death. As a corollary to this issue, or as a further condition, plaintiff had the burden of proving that the assured's death was not directly or indirectly caused or contributed to, within the meaning of the contract, by disease or natural causes.

The trial consumed a considerable number of days. Six eminent heart specialists, and several other highly qualified medical specialists testified at great length. The court having been placed in the uninviting position of testing the sharply conflicting conclusions of the medical experts with respect to the manner of occurrence of the death, it has reviewed the testimony and the record, and has been convinced by a preponderance of the evi-

dence that the assured at the time of his death was a vigorous, robust man of normal health for his age; that the condition of his heart and arteries, while less than perfect when measured by a standard of perfection, was "normal" and "healthy" and not diseased within the meaning of those words for purposes of the policies in question; that on February 10, 1953, an accidental discharge of assured's shotgun resulted in injury to the assured to the extent of powder burns and at least one gunshot pellet being propelled into his face; that as a consequence of these bodily injuries a shock reaction commenced in the assured which terminated with heart failure; that although a heart which was perfect when measured on an absolute standard would have withstood the pain and shock of the injuries received by the assured, many hearts which are considered in view of the age and general condition of their possessors normal and robust, and not diseased within the meaning of the policies in question, might have succumbed to injuries and shock such as those received by the assured; that the assured in fact succumbed by reason of the injuries and resultant shock he accidentally sustained; and that the plaintiff has sustained his burden of proof on all matters before the court.

The wealth of evidence in this case is too great to permit of extended discussion. It may be noted briefly, however, that the autopsy report upon which defendants place reliance does not note the vital fact of the degree of diminishment of the aortic

lumen; that a diminishment in small part of the lumen, although noticeable, and properly noted by an autopsy surgeon, is nevertheless consistent with a properly functioning aorta; that in the absence of a detailed finding of the degree of diminishment of the lumen, the effect of such diminishment is left to speculation and surmise; that many men of the age group of the assured have some degree of diminishment of the aortic lumen without being diseased within the meaning of the policies; that the presence of atheromatous plaques on the aortic valves likewise is an insufficient notation upon which to found a conclusion of incompetence of the valves without some greater description of the degree of stiffness, warpedness, shrinkage, or other malfunction of the valves; that the autopsy report leaves the degree, if any, of malfunctioning of the valves a matter of speculation, for lack of a sufficient description of the degree, character, and effect of the atheromatous plaques discovered on the assured's aortic valves. Likewise, it may be noted briefly that defendant's expert witnesses did not have the same opportunity to observe the assured at close range and for a period of more than a day while he was engaged in strenuous activity and exertion, as did plaintiff's expert witnesses. The conclusions of defendant's expert witnesses that heart failure came on suddenly on February 10th are inconsistent with the conclusions of plaintiff's expert witnesses who had observed the deceased during periods of peak exertion and strain, greater

than any undergone by the deceased immediately before his death, and who had not detected any signs in the deceased's appearance which would have alerted their trained senses. Defendant's experts' other hypothesis of death, that the heart failure was brought on by a sudden sharp pain caused by a passing of a gallstone through the cystic duct, is made too remote and speculative a possibility and too unlikely a sequence of facts by the overwhelming weight of the other expert testimony in this case.

These brief observations are made not to represent the complete or exclusive basis upon which the court has made its findings, but only to answer some of the main contentions made by the defendant, out of deference to the extreme skill with which they, as well as counsel for plaintiff, have presented their case. All counsel associated with these cases are to be commended upon the manner in which they prepared and presented them. Let the prevailing party prepare findings of fact and conclusions of law in accordance with the Rule, if it is so desired.

Dated: October 12th, 1956.

/s/ EDWARD P. MURPHY,

United States District Judge.

[Endorsed]: Filed October 16, 1956.

[Title of District Court and Cause.]

Civil No. 7256

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having come on regularly for trial before the undersigned judge of the above-entitled Court, the Court having heard the opening statements of counsel, the evidence adduced by both parties and having considered the same, together with all exhibits received in evidence herein and the briefs of counsel, and being of the opinion that the plaintiff has sustained her burden of proof on all matters involved herein, the Court does hereby make the following:

Findings of Fact

I.

Diversity of citizenship exists between the parties in that plaintiff is a citizen and resident of the state of Oregon and defendant is an association of individuals engaged in the insurance business, each member thereof being a nonresident of the state of Oregon.

II.

The amount in controversy herein exceeds \$3000, exclusive of interest and costs.

III.

Prior to the 10th day of February, 1953, defendants issued in the state of Oregon Lloyds accident

policy No. O-5058-1 in the amount of \$25,000, and Lloyds accident policy No. O-OMC-1740, in the amount of \$75,000. Under said policies James Alexander Lyons was the named insured and plaintiff herein was the designated beneficiary thereunder. Said policies were in full force and effect on the 10th day of February, 1953.

IV.

Under and by virtue of the terms and provisions of said policies, the principal sum thereunder became payable to plaintiff in the event the said James Alexander Lyons shall:

(a) Sustain bodily injury caused by accidental, violent, external and visible means which should solely and independently of any other cause within three calendar months from the date of the accident causing such injury occasion his death; and

(b) That such death be not directly or indirectly caused or contributed to by disease or natural causes.

V.

On or about the 10th day of February, 1953, the said James Alexander Lyons sustained bodily injury caused by accidental, violent, external and visible means which solely and independently of any other cause occasioned his death within three calendar months from the date of the accident which caused said injury. Said injury was caused by the accidental discharge of a shotgun.

VI.

Said James Alexander Lyons was a vigorous, robust man of normal health for his age and was not suffering from disease. His said death was not caused or contributed to directly or indirectly by disease or natural causes.

VII.

On or about October 14, 1953, plaintiff submitted due proof of said death to defendants and more than six months has elapsed since the submission of such proof. Defendant has failed and neglected to pay to plaintiff said principal sum or any part thereof.

Based upon said Findings, the Court hereby makes and draws the following:

Conclusions of Law

I.

Plaintiff is entitled to recover of and from the defendants the sum of \$100,000, together with interest thereon at the rate of 6% per annum from October 14, 1953, until paid.

II.

Under Oregon law plaintiff is entitled to recover of and from the defendant a reasonable attorney's fee to be later found and established by the Court and the Court does hereby reserve jurisdiction for the purpose of finding, fixing and awarding such attorney's fee.

III.

Plaintiff is entitled to recover her necessary costs and disbursements herein incurred.

Dated this 9th day of November, 1956.

/s/ EDWARD P. MURPHY,

United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 13, 1956.

[Title of District Court and Cause.]

SUPPLEMENTAL FINDINGS OF FACT

It having been stipulated by the parties hereto that the issue of the amount to be allowed to plaintiff on account of a reasonable attorney's fee herein be submitted to the court for determination upon the record, the court does hereby make the following

Supplemental Findings of Fact

I.

The sum of \$20,000.00 is a reasonable sum to be allowed plaintiff on account of attorney's fees herein.

Dated this 9th day of November, 1956.

/s/ EDWARD P. MURPHY,

United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 13, 1956.

The United States District Court
for the District of Oregon

Civil No. 7256

JANE S. LYONS,

Plaintiff,

vs.

UNDERWRITERS AT LLOYD'S, LONDON,
ENGLAND,

Defendant.

JUDGMENT ORDER

The above-entitled cause came on regularly for trial without a jury before the Honorable Edward P. Murphy, Judge of the above-entitled Court, commencing on November 22, 1955, and concluding December 8, 1955. Plaintiff appeared in person and by Robert F. Maguire and Howard K. Beebe of her attorneys, and defendant appeared by Ray Mize and R. E. Kriesien, their attorneys. The respective parties introduced evidence upon the issues raised by the Pretrial Order and their counsel argued the law and the facts by briefs. The Court having considered the evidence, arguments and briefs, and having made its Findings of Fact and Conclusions of Law, now, therefore,

It Hereby Is Considered, Ordered and Adjudged that plaintiff recover of and from the defendant the sum of \$100,000, together with interest thereon at the rate of 6% per annum from the 14th day of October, 1953 until paid, together with the further

sum of \$20,000.00 as and for a reasonable attorney's fee herein, and her costs and disbursements herein incurred.

Dated this 9th day of November, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 13, 1956.

[Title of District Court and Cause.]

Civil No. 7256

NOTICE OF APPEAL

Notice is hereby given that Underwriters at Lloyd's London, England, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 13, 1956.

Dated this 10th day of December, 1956.

MEINDL, MIZE & KRIESIEN;

By /s/ R. E. KRIESIEN,
Of Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed December 11, 1956.

[Title of District Court and Cause.]

Civil No. 7256

UNDERTAKING FOR COSTS
ON APPEAL

Whereas, Underwriters at Lloyd's London, England, defendant in the above cause, has appealed to the United States Court of Appeals for the Ninth Circuit from that certain judgment made and entered in favor of plaintiff and against said defendant in the above court on or about the 13th day of November, 1956, which said judgment was and is for the sum of One Hundred Thousand Dollars (\$100,000), together with interest thereon at the rate of 6 per cent per annum from the 14th day of October, 1953, until paid, together with the further sum of Twenty Thousand Dollars (\$20,000) as and for reasonable attorney's fees herein, and for her costs and disbursements.

Now, Therefore, in Consideration of the premises and of such appeal, we, Underwriters at Lloyd's London, England, as principal, and Indemnity Insurance Company of North America, a Pennsylvania corporation, duly authorized to engage in the business of a surety in the State of Oregon and the State of California, do hereby jointly and severally undertake and promise on the part of said defendant-appellant that said defendant-appellant will pay all damages, costs and disbursements which may be awarded against it on said appeal.

Dated at Portland, Oregon, this 11th day of December, 1956.

UNDERWRITERS AT LLOYD'S LONDON,
ENGLAND;

By /s/ [Illegible],
Attorney in Fact.

[Seal] INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA;

By /s/ DONALD McCAMBRIDGE,
Attorney in Fact.

Countersigned:

STEVENS & BREWSTER,
/s/ BY HENRY C. O. STEVENS,
Oregon Resident Agent.

[Endorsed]: Filed December 11, 1956.

[Title of District Court and Cause.]

Civil No. 7256

SUPERSEDEAS BOND

Know All Men by These Presents:

That the Indemnity Insurance Company of North America, a corporation created, organized and existing under and by virtue of the laws of the State of Pennsylvania, and duly authorized to carry on a general casualty insurance business within the State

of Oregon and the State of California, and in the courts of the United States, is held and firmly bound unto Jane S. Lyons, plaintiff, in the full and just sum of One Hundred Sixty Thousand Dollars (\$160,000), to be paid to the said Jane S. Lyons, her administrators, executors, successors, or assigns, to which payment, well and truly to be made, it binds itself, its successors and assigns firmly by these presents.

Signed and sealed this 19th day of December, 1956.

Whereas, on November 13th, 1956, in an action pending in the United States District Court for the District of Oregon, between Jane S. Lyons, as plaintiff, and Underwriters at Lloyd's London, England, as defendant, Civil Action No. 7256, final judgment was rendered in favor of the said plaintiff, Jane S. Lyons, and against Underwriters at Lloyd's London, England, as defendant, for One Hundred Thousand Dollars (\$100,000), together with interest thereon at the rate of 6 per cent per annum from the 14th day of October, 1953, until paid, together with the further sum of Twenty Thousand Dollars (\$20,000) attorneys' fees and costs taxed at Six Hundred Forty-five Dollars and Sixty Cents (\$645.60); and the said defendant, Underwriters at Lloyd's London, England, having filed a notice of appeal from such judgment to the United States Court of Appeals for the Ninth Circuit;

Now, Therefore, the condition of this obligation is such that if the said Underwriters at Lloyd's

London, England, shall prosecute its appeal to effect and shall satisfy the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, or shall satisfy in full such modification of the judgment and such costs, interest and damages as the said Court of Appeals may adjudge and award, then this obligation to be void; otherwise to remain in full force and effect.

[Seal] INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,

By /s/ DONALD McCAMBRIDGE,
Attorney in Fact.

Countersigned by:

STEVENS & BREWSTER,
/s/ By HENRY C. O. STEVENS,
Resident Agent.

Approved: December 24, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed December 28, 1956.

[Title of District Court and Cause.]

Civil No. 7256

STATEMENT OF POINTS ON APPEAL

The points upon which defendant-appellant will rely on appeal are:

1. The court erred in failing to enter judgment for defendant.

2. The court erred in finding that the assured, James Alexander Lyons, on or about February 10, 1953, sustained bodily injury caused by accidental, violent, external and visible means which solely and independently of any other cause occasioned his death within three calendar months from said date.

3. The court erred in finding that said assured, James Alexander Lyons, suffered an injury, on or about February 10, 1953, from an accidental discharge of a shotgun which caused the assured's, James Alexander Lyons', death.

4. The court erred in finding that said assured, James Alexander Lyons, was a robust man for his age, was not suffering from disease, and that his death was not caused or contributed to directly or indirectly from disease or natural causes.

5. The court erred in considering speculative, incompetent and inadmissible evidence in finding for plaintiff.

6. The court erred in entering a judgment in favor of plaintiff, Jane S. Lyons.

7. The court erred in failing to find that the plaintiff failed to sustain her burden of proof by any competent, substantial evidence that the discharge of the shotgun preceded the onset of the fatal heart attack which caused the assured's, James Alexander Lyons', death.

8. That the court erred in failing to find that the plaintiff failed to sustain her burden of proof by any competent, substantial evidence that any bodily injury which may have been sustained by the assured, James Alexander Lyons, solely and independently of all other causes resulted in the assured's, James Alexander Lyons', death.

9. That the court erred in failing to find that the plaintiff failed to sustain her burden of proof by any competent, substantial evidence that the assured's, James Alexander Lyons', death was not caused or contributed to by a pre-existing heart disease.

Dated this 8th day of January, 1957.

/s/ R. E. KRIESIEN,

Of Attorneys for Defendant-
Appellant.

Service of copy acknowledged.

[Endorsed]: Filed January 8, 1957.

[Title of District Court and Cause.]

No. 7256

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents, consisting of Complaint, Answer, Order of Consolidation, Pretrial Order, Memorandum Opinion, Proposed Findings of Fact and Conclusions of Law, Proposed Supplemental Findings of Fact, Judgment Order, Notice of Appeal, Undertaking for Costs on Appeal, Supersedeas Bond, Statement of Points on Appeal, Designation of Contents of Record on Appeal, Order to Forward Exhibits to Court of Appeals, and Transcript of Docket Entries, constitutes the record on appeal from a judgment of said court in a cause therein numbered Civil 7256, in which Underwriters at Lloyd's London, England, is the appellant and defendant, and Jane S. Lyons is the appellee and plaintiff; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the deposition of Homer P. Rush, M.D. The exhibits, Nos. 1 to 44, and the transcript of testimony in this case and the companion case, Civil 7381,

Jane S. Lyons, Plaintiff, vs. Glens Falls Indemnity Co., Defendant, have been forwarded by Railway Express by the attorneys for the appellant.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 14th day of January, 1957.

[Seal] R. DE MOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 15412. United States Court of Appeals for the Ninth Circuit. Underwriters at Lloyd's London, England, Appellant, vs. Jane S. Lyons, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed January 15, 1957.

Docketed January 17, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15412

UNDERWRITERS AT LLOYD'S LONDON,
ENGLAND,

Appellant,

vs.

JANE S. LYONS,

Appellee.

MOTION FOR CONSOLIDATION

Come now appellant and appellee by and through their respective counsel and move this court for an order consolidating the within case with that of Jane S. Lyons vs. Glenn Falls Indemnity Co., a New York corporation, Civil No. 7381, for printing and oral argument purposes.

In support of said motion attached hereto is affidavit of R. E. Kriesien, of counsel for appellant.

Dated this 8th day of January, 1957.

MAGUIRE, SHIELDS,
MORRISON & BAILEY;

By /s/ HOWARD K. BEEBE,
Of Attorneys for Appellee.
MEINDL, MIZE & KRIESIEN;

By /s/ R. E. KRIESIEN,
Of Attorneys for Appellant.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge;

/s/ WALTER L. POPE,

/s/ FREDERICK G. HAMLEY,
United States Circuit Judges.

AFFIDAVIT

State of Oregon,
County of Multnomah—ss.

I, R. E. Kriesien, being first duly sworn according to law, do depose and say:

That I am one of the attorneys for appellant in the within action and that the within action was consolidated with the case of Jane S. Lyons vs. Glens Falls Indemnity Co., a New York corporation, Civil No. 7381, for trial in the United States District Court for the District of Oregon by court order; that the issues of fact and law involved in the appeal are identical in each case.

Dated this 7th day of January, 1957.

/s/ R. E. KRIESIEN.

Subscribed and sworn to before me this 7th day of January, 1957.

[Seal] /s/ LEONA F. OSTROSKI,
Notary Public for Oregon.

My commission expires 7/11/59.

[Endorsed]: Filed January 18, 1957.